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## Legal Modernism

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# LEGAL MODERNISM

*David Luban\**

What are the roots of Critical Legal Studies? "The immediate intellectual background . . . is the . . . achievement of early twentieth century modernism . . .,"<sup>1</sup> writes Roberto Unger in his CLS manifesto; he elaborates this modernist connection in his deep and subtle book *Passion*.<sup>2</sup> Other CLS members also draw parallels between their endeavor and artistic modernism.<sup>3</sup>

Obviously, CLS is first and foremost a movement of left-leaning legal scholars; it is also associated with distinctive theoretical claims about law. But it should be equally obvious that CLS involves sensibilities and affinities that are strikingly similar to those of an artistic avant-garde. Moreover, CLS lives in a complicated relationship to its past and to its institutional setting — it simultaneously rejects and builds upon mainstream legal theory, simultaneously reviles and depends upon the legal academy. These ambivalences are strikingly similar to the relationships of artistic modernists to premodern art (on the one hand) and to the commercial art world (on the other).

Social facts like these are never merely superficial; thus, they provide ample reason to consider carefully CLS' connection with artistic modernism. That is my purpose in this essay. The thesis that I want to explore here is roughly this: CLS is to legal theory as modernist art was to traditional art. CLS is legal modernism.

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1. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 587 (1983); see also *id.* at 660-62.

2. R.M. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984).

3. The connection with modernism — which I have mostly heard in conversations with CLS members — was emphasized by Mark Tushnet in his address and comments at the 1986 AALS Jurisprudence Section meeting in Philadelphia. See also Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985), which develops the philosophical (rather than artistic) side of modernism, ending with a call for aesthetic commitment to the reconstruction of our social world.

## I

The thesis has great plausibility. Let me list five characteristics of modern art that CLS writing evidently shares.

(1) *It makes people angry.* In 1907 Matisse visited Picasso in his studio to look at Picasso's latest painting, the epochal *Demoiselles d'Avignon*, the prototype of Cubism. Matisse thought it was a hoax, a spoof on the whole modern movement, and swore that he would "sink Picasso."<sup>4</sup> Similarly, the premier of Stravinsky's *Le Sacre du Printemps* produced a riot (and one critic labeled the work *Massacre du Printemps*<sup>5</sup>).

(2) *It leaves an important hunger unsatisfied.* When Braque saw *Demoiselles d'Avignon* in 1908, he commented: "It is as though we were supposed to exchange our usual diet for one of tow and paraffin."<sup>6</sup> As Leo Steinberg describes it, "There is a sense of loss, of sudden exile, of something willfully denied — sometimes a feeling that one's accumulated culture or experience is hopelessly devalued, leaving one exposed to spiritual destitution."<sup>7</sup>

(3) *It bursts into public surrounded by manifestos, polemics, criticisms, labels, and words, words, words.* The phenomenon need hardly be remarked upon; it was savagely lampooned by Tom Wolfe in *The Painted Word*,<sup>8</sup> a book whose title tells all. According to Wolfe, Pollock exists only as an illustrator of Greenberg's theories, just as de Kooning illustrates Rosenberg's, and Johns illustrates Steinberg's. Artistic subject and critical predicate have been reversed. More sympathetically, Stanley Cavell writes: "Often one does not know whether interest is elicited and sustained primarily by the object or by what can be said about the object. My suggestion is not that this is bad, but that it is definitive of a modernist situation."<sup>9</sup>

Nobody would disagree that these are three characteristics of modernism. The next two are more controversial.

(4) *The characteristic failing of modernist work, when it fails, is not that it is bad but that it is fraudulent,*<sup>10</sup> by which I mean this: art is

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4. L. STEINBERG, *Contemporary Art and the Plight of Its Public*, in OTHER CRITERIA: CONFRONTATIONS WITH TWENTIETH-CENTURY ART 4 (1972).

5. Stravinsky, however, gave as well as he got, describing Glazunov as "Carl Philipp Emanuel Rimsky-Korsakov." And Poulenc relates that no Parisian modernist dared listen to Viennaschool music, because Stravinsky referred to *Wozzeck* as "*une musique boche*" and to Mahler as "*Malheur*." I. STRAVINSKY & R. CRAFT, *RETROSPECTIVES AND CONCLUSIONS* 193 (1969).

6. L. STEINBERG, *supra* note 4, at 6.

7. *Id.* at 7.

8. T. WOLFE, *THE PAINTED WORD* (1975).

9. S. CAVELL, *Music Discomposed*, in *MUST WE MEAN WHAT WE SAY?* 207 (1969).

10. *Id.* at 188-89.

always the working of a medium — objects, pigments, sounds, words — but not every working of a medium is art. To offer something as a work of art is to claim that the medium has in some way been transfigured, that it is now *more* than objects, pigments, sounds, or words. If that claim is false, then the work is a fraud, for it holds itself out as art when it is not. Clement Greenberg described the sculpture of Anne Truitt as art that “flirt[s] with the look of non-art,”<sup>11</sup> and this description holds to some extent, I think, for all modernism, at least when we first see it. Sometimes it crosses the line into non-art; and, since it nevertheless holds itself out as art, it is a fraud. As Cavell puts it:

If you look at a Pollock drip painting or at a canvas consisting of eight parallel stripes of paint, and what you are looking for is *composition* (matters of balance, form, reference among the parts, etc.), the result is absurdly trivial: a child could do it; I could do it. The question, therefore, if it is art, must be: How is this to be seen? What is the painter doing? The problem, one could say, is not one of escaping inspiration, but of determining how a man could be inspired to do *this*, why he feels *this* necessary or satisfactory, how he can *mean* this. Suppose you conclude that he cannot. Then that will mean . . . that you conclude that this is not art, and this man is not an artist; that in failing to mean what he's done, he is fraudulent.<sup>12</sup>

John Cage's 4'33" (the notorious silent “piano” piece) crosses the line into non-art, as (in my opinion) do Ad Reinhardt's all-over-black paintings and Duchamp's urinal. Aleatoric music, and some Pop Art, are fraudulent.

I do not mean to imply that fraudulence is the *only* way modernist art can fail, that modernist art admits of no judgments of quality. Obviously, dull or minor Cubist works were painted, unimaginative and tedious serial music was composed. My claim is only that the charge of fraudulence is the most characteristic accusation leveled against modernist works, especially at first. (And some modernist works, such as Duchamp's urinal, cannot *conceivably* be criticized in terms of quality rather than fraudulence.)

Finally, most controversially:

(5) *The artist herself cannot know beyond a doubt that she is creating art, rather than non-art or fraudulent art.* No matter how sure his own eye, Pollock could not know that his all-over drip paintings were paintings; nor could Schoenberg know that *Pierrot Lunaire* was music. That is because, by definition, a fraud can take you in; and the artist herself is no less gullible than her audience. The artist may sin-

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11. Greenberg, *Recentness of Sculpture*, in *MINIMAL ART: A CRITICAL ANTHOLOGY* 185 (G. Battcock ed. 1968).

12. S. CAVELL, *supra* note 9, at 203.

cerely intend a piece to be art, but neither *being an artist* nor *sincerely intending* are sufficient to grant one more insight into what one's art has become than any other member of the community possesses.

To put it another way, modernism throws into question the essence of the art, or rather, throws into question whether the art has an essence, and opens up a number of directions in which the art can be reconstituted and recharacterized. Only if, in the bright light of the public and the fullness of time, the work sustains the level of conviction that the art of the past sustained, will it prove to be an instance of its art (painting, music, legal theory) at all (by showing us something that, all along, the art was).

My first suggestion, then, is that CLS is legal modernism because: it makes people angry, it leaves a hunger unsatisfied (*e.g.*, for "serious" doctrinal analysis, or practicable alternative proposals), it thrives in an atmosphere of polemic and manifesto and auto-commentary, its characteristic mode of failure is quackery rather than mediocrity, and the members of the CLS movement themselves don't know — I say: *can't* know — when they are worth taking seriously.

## II

The five characteristics I have just listed constitute an *external* or symptomatic description of modernism — they concern the way modernist work is received, and the way it presents itself. More important (perhaps) is an internal description of modernism. This, of course, is a subject over which much ink has been spilled, and it will scarcely be possible to find a noncontroversial internal description of modernism. (Modernism is like Marxism in that deadlier enmities form within the movement over the question of what the movement is and what it means than over anything else, including how to deal with external threats.)

I propose to distinguish two ways of characterizing modernism, one concerned with the content of modernist art, the other with its form.

For the content, I rely on Unger. He lists writers whom he considers modernism's paradigms: Proust, Joyce, Woolf, Kraus, Beckett, Bely, Kafka, Musil, Céline, Eliot, and Montale, and (among philosophers) Heidegger and Sartre;<sup>13</sup> he describes their primary themes in three theses:

(1) "[O]ur dealings with other individuals have primacy over the search for an impersonal reality or good. And among all encounters [modernists] ascribe special importance to those that put in question

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13. R.M. UNGER, *supra* note 2, at 33.

the relation between the requirements of self-assertion" (by which Unger means: between the requirement to open ourselves to others and the requirement to protect ourselves from them).<sup>14</sup>

(2) "[T]he conviction that the person transcends his contexts";<sup>15</sup> "the intolerance of all limits."<sup>16</sup>

(3) "The modernists often combine an acknowledgment of the supreme importance of personal love with a skepticism about the possibility of achieving it or, more generally, of gaining access to another mind."<sup>17</sup>

These theses stress the themes of homelessness (in the world, among other people, in one's roles) and isolation. I shall refer to this account of modernism's content as the "exile-motif" — the notion of exile encompasses isolation as well as homelessness. (So does the over-worked word "alienation," but it has come to mean so many things that I shall not make it mean one more.)

More important than the content-based account of modernism, however, is the theory of modernist form, in the wide sense that includes language (vocabulary) as well as organization (syntax). One is more likely to think of the formal experiments of Joyce and Kafka and Woolf — of stream-of-consciousness and difficult language and allusiveness and dreamlikeness and freeing-up of plotline — than of the exile-motif. In music one thinks of tone-rows and folk songs and dissonance; in the visual arts, of abstraction and surrealism.

In what follows, I shall be relying upon a theory of modernism developed by Clement Greenberg and Michael Fried (writing about the visual arts) and Stanley Cavell (writing about music).<sup>18</sup> Greenberg states the basic theory thus:

I identify Modernism with the intensification, almost the exacerbation, of [the] self-critical tendency that began with the philosopher Kant. . . .

The essence of Modernism lies, as I see it, in the use of the characteristic methods of a discipline to criticize the discipline itself — not in order to subvert it, but to entrench it more firmly in its area of competence. . . .

. . . .

. . . The arts could save themselves from . . . leveling down only by demonstrating that the kind of experience they provided was valuable in its own right and not to be obtained from any other kind of activity.

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14. *Id.* at 35.

15. *Id.* at 36.

16. *Id.*

17. *Id.* at 38.

18. I do not mean to imply that Greenberg, Fried, and Cavell agree in their views. Fried states some important criticisms of Greenberg in Fried, *How Modernism Works: A Response to T.J. Clark*, in *THE POLITICS OF INTERPRETATION* 221, 226-29 (W.J.T. Mitchell ed. 1983).

. . . Each art had to determine, through the operations peculiar to itself, the effects peculiar and exclusive to itself.<sup>19</sup>

Similarly, Cavell writes, "Whatever painting may be about, modernist painting is about *painting*, about what it means to use a limited two-dimensional surface in ways establishing the coherence and interest we demand of art."<sup>20</sup>

The Greenberg-Fried-Cavell approach to modernism is often termed "formalist." I think this is a misnomer, since the self-criticism of an art often manifests itself in a piece's content. The use of allusions to premodernist work, for example, is a typical modernist device: think of Manet's ironic allusion to Titian's sumptuous nude *Venus of Urbino* in his *Olympia* — a painting of a nude prostitute in the identical posture. This is surely not a formal device.<sup>21</sup> In line with Greenberg's initial characterization, I shall call the Greenberg-Fried-Cavell theory "neo-Kantian" rather than formalist.<sup>22</sup>

Let us see how the theory works by considering an example. A neo-Kantian account might explain the emergence of abstraction as a criticism, within painting, of the traditional conception of painting as pictorial — that is, of the idea that a necessary condition for the possibility of an object's being a painting is that it represent something.<sup>23</sup>

19. Greenberg, *Modernist Painting*, in *THE NEW ART* 67-68 (G. Battcock rev. ed. 1973).

20. S. CAVELL, *supra* note 9, at 207; *see also id.* at 219-20 (for an elaboration in the direction of the Greenberg excerpt); Fried, *Introduction* to *THREE AMERICAN PAINTERS* (Fogg Art Museum 1965).

21. Greenberg helped propagate the notion that his theory is "formalist." *See* Greenberg, *Necessity of "Formalism,"* 3 *NEW LITERARY HIST.* 171, 173-74 (1971).

For discussion of Manet's use of allusion, *see* Fried, *Manet's Sources: Aspects of his Art, 1859-1865*, *ARTFORUM*, Mar. 1969, at 28 [hereinafter cited as Fried, *Manet's Sources*]. The allusion to Titian's *Venus* is analyzed in T. REFF, *MANET: OLYMPIA* 54-61 (1976). An interesting recent discussion of *Olympia* is T.J. CLARK, *THE PAINTING OF MODERN LIFE: PARIS IN THE ART OF MANET AND HIS FOLLOWERS* 79-146 (1984). Fried and Clark consider their approaches to be competitors — *see* their debate: Clark, *Clement Greenberg's Theory of Art*, in *THE POLITICS OF INTERPRETATION*, *supra* note 18, at 203; Clark, *Arguments About Modernism: A Reply to Michael Fried*, in *THE POLITICS OF INTERPRETATION*, *supra* note 18, at 239; Fried, *supra* note 18 — but neither of them need disagree with the other about whether the allusion to Titian is a nonformal self-criticism of art.

22. Indeed, Greenberg's notion of modernism as the attempt to lay bare the necessary conditions for the possibility of each separate art bears a distant resemblance to the philosophy of symbolic forms of the neo-Kantian philosopher Cassirer. *See* E. CASSIRER, *THE PHILOSOPHY OF SYMBOLIC FORMS* (1953-57) (Vol. 1: *LANGUAGE*; Vol. 2: *MYTHICAL THOUGHT*; Vol. 3: *THE PHENOMENOLOGY OF KNOWLEDGE*); E. CASSIRER, *AN ESSAY ON MAN* (1944).

23. Greenberg himself gives a more complex account, his famous "theory of flatness" nicely mocked by Wolfe: Old Master painting, representing depth on a flat surface, dissembled about the essential flatness of the surface, making painting "sculptural." Modernist painting emphasizes the flatness of the canvas, and the abandonment of representation follows as a corollary of the abandonment of the third dimension. Greenberg, *supra* note 19, at 68-70; *see also* C. GREENBERG, *Abstract, Representational, and so forth; Modernist Sculpture, Its Pictorial Past; Byzantine Parallels; and On the Role of Nature in Modernist Painting*, in *ART AND CULTURE* 133, 158, 167, 171 (1961).



Alinari/Art Resource

TITIAN, VENUS OF URBINO



Giraudon/Art Resource

MANET, OLYMPIA



By abandoning representation, Kandinsky's *Improvisations* — the first abstract paintings — make us see that representation was merely a convention, a limitation. For the *Improvisations* are clearly paintings of the highest quality even though they are neither pictorial nor merely decorative.

The *Improvisations*, in other words, contain the criticism of pictorial painting in them as if it were a subject matter. I must add one important qualification, however. The neo-Kantian theory of modernism is a relatively conservative one, in two ways. First, the self-criticism of an art is not simply a negation or rejection of it; it is a dialectical — though not a necessary — development of the art within the art. Modernist art is the *determinate* negation of premodernism. (The *Improvisations* appear to us now as a logical development and extension of the representational pictures Kandinsky and Gabriele Münter were painting in Murnau after 1908. That the turn to abstraction, though logical, was not necessary is illustrated by the fact that Münter never made the turn but nevertheless continued to deepen as an artist.)

Second, neo-Kantian modernism still seeks to live up to the quality achieved by the great premodernist works. Though modernism is suspicious of the capacity of the premodernist tradition to sustain significant art any longer, it is not suspicious of the significance of premodernist art.

For, on the neo-Kantian theory, the self-criticism of an art cannot rest content merely with abandoning conventions. Abandoning a convention is only half the demonstration that the art can get along without it: the other half, of course, is that the modernist work convinces us that it is still an instance of the art. The abstract painting must provide us with aesthetic rewards comparable to (though different from) a traditionalist painting. There will remain, I have said, some aesthetic hunger that the abstract painting does not satisfy; but as it works on us over time — and it had better not take too much time — it creates and fulfills new modes of aesthetic wanting. Otherwise it has failed — not just as a painting, but as painting. Thus the neo-Kantian account continues to respect the art's tradition.

### III

There is a connection between the neo-Kantian account of modernist form and Unger's insistence that the exile-motif is its content. The abstract artist does not criticize representational painting merely because it involves a mistaken thesis about what paintings are (*i.e.*,



Chester Dale Collection  
National Gallery of Art, Washington

### MANET, THE OLD MUSICIAN

necessarily pictorial). She confronts representational painting with the much stronger charge that it *lies* about the world. It lies by using the illusionist techniques that since Brunelleschi have been its chief point of pride, in order to pretend that it is not painting, *i.e.*, not just "flatness and the delimitation of flatness."<sup>24</sup> "Realistic, illusionist art had dissembled the medium, using art to conceal art. Modernism used art to call attention to art."<sup>25</sup> Pictorial painting is not a mistake, it is a lie.

24. Greenberg, *After Abstract Expressionism*, ART INTL., Oct. 25, 1962, at 24, 30. I believe Greenberg's "theory of flatness" is directed primarily at Bernard Berenson's claim, in his celebrated 1896 essay *The Florentine Painters*, that the aesthetic worth of painting resides primarily in its representation of "tactile values." B. BERENSON, *ITALIAN PAINTERS OF THE RENAISSANCE* 40-43 (1957). This illustrates how modernism amounts to an internal, or dialectical, criticism of traditional painting: Greenberg agrees with Berenson that the great achievement of Florentine painting lay in the representation of "tactile values"; his disagreement is over Berenson's value judgment, which Greenberg takes to be an endorsement of deception.

25. Greenberg, *supra* note 19, at 68. Brunelleschi had demonstrated his invention of linear perspective in a remarkable way, which illustrates what the modernist is complaining about. He painted the Florentine Baptistery mirror-reversed on a board, drilled a hole in the board, placed burnished silver on top of the painting (to reflect sky and moving clouds), and placed the whole contrivance directly in front of the Baptistery itself, facing the Baptistery. The beholder would first look at the Baptistery, and then look through the hole in the back of the painting, holding a mirror to the painting. In the mirror, he would see the Baptistery itself; the perfection of the

More than that: it is not just a lie about what a painting is, but also about what the painting's beholder is, about the ontological relationship between painting and beholder.<sup>26</sup> The illusionist picture pretends to be a window into the scene depicted, a scene which goes on oblivious of the beholder. A traditionalist takes this pretense to be a mark of quality in the painting. Thus, Diderot wrote in praise of Van Dyck:

If, when one paints a picture, one supposes there to be spectators, all is lost. The painter steps out of his canvas, like an actor who talks to the gallery steps out of his scene. It is in pretending that there is no one in the world except the personages in the picture that Van Dyck is sublime.<sup>27</sup>

But to the modernist, this pretense is morally unacceptable. The representational painter turns the beholder into a voyeur. By falsifying the nature of the painting, the voyeur/beholder is able to forget herself, her predicament (a beholder confronting flatness and the delimitation of flatness).<sup>28</sup>

To see what acknowledging the beholder means, one might look at Manet's *Old Musician* in the National Gallery of Art in Washington. Manet is often taken to be the first modernist, and this incredible masterwork plainly acknowledges the relation between painting and beholder in a novel way. The tableau includes a strange assortment of characters who, though paired, are in a state of frozen isolation from, and indifference toward, each other. The shallow space, the abstract color-field landscape, and the lack of modeling — the Old Musician's face alone is strongly modeled — all call attention to the flatness of the canvas in just the way the neo-Kantians emphasize. Similarly, the artificial bisection of the right-hand figure by the edge makes us aware of the canvas as bounded. Moreover, Manet gives the space what depth it has in the most perfunctory of ways. Take away the stage-props —

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illusion was the proof of perspective. See S. EDGERTON, *THE RENAISSANCE REDISCOVERY OF LINEAR PERSPECTIVE* 124-52 (1975) (an account by Manetti, a contemporary of Brunelleschi, is quoted at 127-29). I am indebted to Michael Sukale for allowing me to read an English version of Sukale, *Brunelleschi's Visual Demonstration*, 92 *IYYUN* 129 (1980).

26. This way of framing the issue comes from Fried, particularly Fried, *Art and Objecthood*, in *MINIMAL ART: A CRITICAL ANTHOLOGY* 116 (G. Battcock ed. 1968); M. FRIED, *ABSORPTION AND THEATRICALITY: PAINTING AND BEHOLDER IN THE AGE OF DIDEROT* (1980).

27. "Si quand on fait un tableau, on suppose des spectateurs, tout est perdu. Le peintre sort de sa toile, comme l'acteur qui parle au parterre sort de la scène. En supposant qu'il n'y a personne au monde que les personnages du tableau, celui de Vandick est sublime." Quoted in M. FRIED, *ABSORPTION AND THEATRICALITY*, *supra* note 26, at 149.

28. Obviously, such a sweeping account of representational painting must be false in the details. For a compelling argument that seventeenth-century Dutch painting differed from Italian painting in its representational assumptions, see S. ALPERS, *THE ART OF DESCRIBING* (1983).

the tree branch, the shadows in the foreground, and the Old Musician's knapsack — and the figures will flatten and pop out like a chain of paper dolls. These are Manet's formal devices.

The depicted characters are figures from — that is, allusions to — paintings by Velasquez, Watteau, LeNain, and Manet himself.<sup>29</sup> Art is thus the content of this painting (the Old Musician is, of course, an artist). The problematic, mediated character of our relation to the depicted scene is emphasized by the inscrutability of the figures. The boy next to the Old Musician and the two right-hand figures in particular appear to have been captured as it were “between poses,” as in a snapshot taken a second too late. The scene thus has no narrative unity, and the only thing that holds it together is the seated figure of the Old Musician himself, gazing out at us, meeting our gaze, inviting us to make what we can of the painting, acknowledging our presence as nothing in painting ever had before. Manet seems explicitly to pose the painting-beholder relationship as the solution to a riddle, leaving us to guess what the riddle itself is.<sup>30</sup> Encountering the figure of the Old Musician is like encountering a demiurge who causes us to understand that it is only the painter's art that sustains the painting — causes us to understand that we are seeing only a painting. And that is what makes it modernist.

Such modernist preoccupations lend themselves especially well to incorporating the exile-motif, which appears with astonishing literalness in *The Old Musician*. Seven silent, unsmiling figures looking in seven different directions, *past* rather than *at* each other: what could more strongly evoke human isolation? They are, moreover, a band of vagabonds on the road. The clothing of the two right-hand figures conveys a sense of formerly comfortable living fallen on hard times; the (motherless?) infant is cared for by a waif. We see this troupe as a band of refugees, as displaced persons;<sup>31</sup> and that is how Manet paints modernist homelessness.

At the same time, *The Old Musician* seems more universal in its meaning than a depiction of *these* people's isolation and homelessness. The painting, in its overall inscrutability, asks to be read as an alle-

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29. Fried, *Manet's Sources*, *supra* note 21, at 29-33.

30. *Id.* at 69 n.27.

31. It is perhaps not incidental that Manet's model for the musician was the leader of a gypsy band, living in a neighborhood of Polish political refugees near the painter's studio. T. REFF, *MANET AND MODERN PARIS* 174 (1982). Interestingly, the musician appears to have been modeled as well on an ancient statue of the philosopher Chrysippos, which Manet sketched in the Louvre in 1860. G. MAUNER, *MANET PEINTRE-PHILOSOPHE: A STUDY OF THE PAINTER'S THEMES* 50 (1975). A gypsy-philosopher seems precisely suited to an exploration of the exile-motif.

gory. I cannot keep myself from seeing the graybeard musician as God, silently inviting us to ponder His creation. But then He is a God whose creatures freeze into enigmatic immobility when the animating violin falls silent. And now it *has* fallen silent — for us, for the beholders who have come too soon or too late to hear the Old Musician play. If some such allegorizing interpretation bears up, the painting-beholder relationship in *The Old Musician* becomes an almost terrifying evocation of the exile-motif writ large.

In all these ways *The Old Musician* illustrates how modernist formal devices lend themselves to modernist content. The modernist moral critique of traditional painting is that painting, art in general, has become a form of escapism. And, if it were not the case that some aspects of our lives are hard to face up to, why would we need escape? The exile is able to find solace in art; but, for the modernist, such solace is purchased at the price of truth. The truth of the exile-motif is our homelessness and isolation; and the painter of modern life will need to find ways to acknowledge the beholder and the beholder's predicament.

In short: By incorporating the critique of painting into the painting itself, modernism makes us unable to forget that what we behold is a painting, hence unable to forget that we are its beholders, hence unable to forget ourselves, hence unable — the modernist hopes — to evade who we are. Who we are, according to the modernist, are exiles. Modernism stresses that this is our condition by exiling the beholder from the world of beautiful illusion created by premodernist art. And this is the connection between the exile-motif and the neo-Kantian account of modernism.<sup>32</sup>

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32. Fried's account of this connection is worth quoting at length:

Manet's ambitions are fundamentally realistic. He starts out aspiring to the objective transcription of reality, of a world to which one wholly belongs, such as he finds in the work of Velasquez and Hals. But where Velasquez and Hals took for granted their relation to the worlds they belonged to and observed and painted, Manet is sharply conscious that his own relation to reality is far more problematic. And to paint his world with the same fullness of response, the same passion for truth, that he finds in the work of Velasquez and Hals, means that he is forced to paint not merely his world but his problematic relation to it: his own awareness of himself as *in* and yet *not of* the world. In this sense Manet is the first post-Kantian painter: the first painter whose awareness of himself raises problems of extreme difficulty that cannot be ignored: the first painter for whom consciousness itself is the great subject of his art.

. . . [T]he painting itself is conceived as a kind of *tableau vivant* . . . constructed so as to dramatize not a particular event so much as the beholder's alienation from that event. . . .

But Manet's desire to make the estranging quality of self-awareness an essential part of the content of his work — a desire which, as we have seen, is at bottom realistic — has an important consequence: namely, that self-awareness in *this* particular situation necessarily entails the awareness that what one is looking at is, after all, merely a painting. And this awareness *too* must be made an essential part of the work itself. . . .

For this reason Manet emphasizes certain characteristics which have nothing to do with verisimilitude but which assert that the painting in question is exactly that: a painting. For

To put it another way, modernist art is, very literally, iconoclastic. Its preeminent concern is to remind us, for moral reasons, that art is only art. It reminds us of this by calling attention to the conventions that constitute the art, and it does this by abandoning or unmasking those conventions. In this sense, modernism is a movement whose concern is to deny us the solace of art. (And CLS is modernist to the extent that it tries to deny us the solace of liberal legal theory.) For this reason its natural content is a grim spiritual state.

In this respect, there is nothing specially modern in modernism. Older artists have had iconoclastic concerns and have expressed them in the same ways: calling attention to the artificiality of painting by displaying its constitutive conventions, and using this formal device to present an anxious, spiritually demanding content. These, I think, were the concerns of the great Florentine Mannerists of the early sixteenth century (Pontormo, Rosso, Bronzino). In such paintings as Pontormo's eerie Carmignano *Visitation* or his *Joseph in Egypt* in London's National Gallery, Rosso's *Moses and the Daughters of Jethro* in the Uffizi or his bizarre Louvre *Pietà*, or Bronzino's waxworks portraits, we find the modernist combination of disturbing content and a manner of painting that compels us to confront explicitly the (ontological) fact that it is painting.

Similar concerns preoccupied the great Bavarian church builders, the Zimmermans, the Asams, Balthasar Neumann:

[Bavarian rococo] does not let us forget that what the painter furnishes is no more than theatre. To make this reminder explicit and to exhibit the theatricality of their art, the painters of the Bavarian rococo liked to introduce curtains into their already theatrical compositions. Divine transcendence becomes manifest only as a play within a play.<sup>33</sup>

(Recall Greenberg: "Modernism used art to call attention to art.")

#### IV

Modernist wine need not, then, appear in modernist bottles. Heidegger's *Being and Time* is perhaps the definitive philosophical ex-

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example, Manet emphasizes the flatness of the picture-surface by eschewing modelling and . . . refusing to depict depth convincingly, calls attention to the limits of the canvas by truncating extended forms with the framing-edge, and underscores the rectangular shape of the picture-support by aligning with it, more or less conspicuously, various elements within the painting.

M. FRIED, *supra* note 20, at 49 n.3. This footnote bears careful reading in its entirety. Note that in the final sentence Fried is *not* discussing *The Old Musician*, to which, we have seen, the comments apply, but the other two paintings with which Manet is said to have begun modernism: *Déjeuner sur l'Herbe* and *Olympia*.

33. K. HARRIES, *THE BAVARIAN ROCOCO CHURCH* 125 (1983); see *id.* at 146-55 for further interesting discussion.



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ploration of the exile-motif. Formally, however, it is not particularly modernistic: it is a classic ponderous professorial production, which fits comfortably on the shelf beside Kant's *Critique of Pure Reason* and Hegel's *Science of Logic*. Wittgenstein's *Philosophical Investigations*, on the other hand, is modernist in form as well as theme, abjuring the linear philosophical argument and neat two-, three-, and four-term distinctions of the traditionalist treatise for a book of "philosophical remarks," "really only an album"<sup>34</sup> — the famously teasing dialogues, analogies, and aphorisms that have bewitched and befuddled two generations of philosophers.

The same distinction operates within CLS. Much CLS work treats the modernist exile-motif, but in the standard, nonmodernist form of law review articles. Unger's *Passion*,<sup>35</sup> however, like his manifesto *The Critical Legal Studies Movement*,<sup>36</sup> undertakes a few modernist gestures. *Passion* has no footnotes whatever, nor real chapter titles, nor, for that matter, section headings. Many readers find this annoying, and some are very irritated indeed. ("Who does he think he is, that he doesn't refer to any other writers at all?") Even if one does not have this reaction, the lack of signposts makes it very dense going, rather like the multi-page run-on sentences and lack of paragraphing and chapter headings in Thomas Bernhard's modernist novels.

Though I think that these formal features are of strictly secondary importance in Unger, they may be given a neo-Kantian modernist interpretation. On the neo-Kantian view, remember, a modernist painting calls attention to presuppositions of painting by violating them — violating illusionism through abstraction, for example. When Unger leaves out all the paraphernalia of legal scholarship, he invites us to ask what purpose it serves. Why must every thought be footnoted? (Is it because scholars are supposed to derive their ideas from a tradition, rather than secluding themselves with their own thoughts?) Why are we afraid of argument without precedent? (Is it because lawyers commit the category-mistake of equating legal theory with legal opinions, reifying the past in our thinking as we do in appellate decisions?) Why must thought be organized in outline form, with neat section headings? (Is it because a more plastic way of thinking is supposed to be unrigorous? Is it because we need slogans and labels for thoughts before we are able to recognize them?)

In general, it seems to me that Unger's austere way of proceeding

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34. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ix (G.E.M. Anscombe trans. 1953).

35. R.M. UNGER, *supra* note 2.

36. Unger, *supra* note 1.



is an attempt to rip down the landmarks and prepackagings that we use to negate the strangeness of thought and avoid confronting it on its own terms. If I am right, then, these formal devices are modernist in the second neo-Kantian sense as well: they attempt explicitly to acknowledge the very problematic relationship between book and reader (beholder), by forcing the reader out of the voyeuristic mode in which we customarily appropriate scholarship.

*Passion* is, nevertheless, only slightly modernist in form. It is an explicit treatment of the modernist exile-motif; but mostly it is a traditional book of philosophy or, perhaps, speculative psychology. I would now like to consider the one CLS piece I know of that is through-and-through modernist, Peter Gabel and Duncan Kennedy's "article" *Roll Over Beethoven*.<sup>37</sup>

*Roll Over Beethoven* is a dialogue between "Peter" and "Duncan," apparently the transcript of a taped conversation between the article's authors. It is exhausting to read — fifty-four pages of transcript that often sounds like a pair of old acid-heads chewing over a passage in Sartre. (One finds sentences such as this: "*Peter*: It is not inconsistent to, on the one hand, realize the projective temporal character of human existence, in which no one is identity, and the living subject is continually not what he or she is by moving into the next moment in a creative and constitutive way."<sup>38</sup>)

Roughly put, the topic of the conversation is the role of theory in the CLS movement, Duncan accusing Peter of "betraying our program by conceptualizing it,"<sup>39</sup> and Peter replying that "we can be explicit about what it is that human beings are trying to do."<sup>40</sup> But this is very rough: the conversation is complex, passing from one topic to another in the improvisatory manner of real conversations. About halfway through, it turns to the topic of rights, and various themes interweave from that point on.

The tone of much of the conversation is cheeky. Duncan demonstrates his impatience with the language of theory by replacing Peter's term "unalienated relatedness" with "intersubjective zap" and "making the kettle boil,"<sup>41</sup> remarking that if you don't watch out, "the body snatchers are always nearby, and you wake up and they're all pods. The whole conceptual structure has been turned into a cluster of

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37. Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

38. *Id.* at 19.

39. *Id.* at 1.

40. *Id.* at 5.

41. *Id.* at 4-5.

Pods."<sup>42</sup> Academicians, apparently, are the body snatchers.

*Roll Over Beethoven* certainly satisfies the external criteria of modernism. It makes people mad. (Rumor has it that a well-known professor was so upset when Kennedy presented *Roll Over Beethoven* at the Columbia Legal Theory Workshop that he totaled his car on the way home.) If you're looking for scholarship, you will leave *Roll Over Beethoven* hungry; you might remark, as two well-known abstract painters did at Jasper Johns' first show, "If this is painting, I might as well give up," and "Well, I am still involved with the dream."<sup>43</sup>

Furthermore, *Roll Over Beethoven* appears with the maximum hype (it is the first article in the *Stanford Law Review* CLS symposium issue — the largest-selling single law review issue in history, incidentally — which is a batch of polemics and auto-commentaries that would have been completely familiar in tone and purpose to the protagonists and antagonists of early modernism's art wars). It can impress readers as a complete fraud. And one can be confident that its authors are in no better position than any other reader to judge whether that is what it is.

My own initial reaction to *Roll Over Beethoven* was that it was a pile of crap. How dare they waste my time with a self-indulgent rap session! I was able to read only the first half of the article — it *is* tiring — then dipped into a few more pages to assure myself that it was all of a piece, then made fun of it to everyone within earshot. It's boring. It's rude. If Duncan Kennedy weren't notorious (and from Harvard), no journal would touch it without using tongs. Gabel ought to burn his library of phenomenology and take a cold shower. Anyone can turn on a tape-recorder and reel off a lot of pretentious pickle-smoke.

You recognize a classic reaction to modernism. Anyone can do a drip-painting. Anyone can make random percussion sounds. It isn't real art, or music, or legal theory, or philosophy, or, or, or . . .

I reread *Roll Over Beethoven*. On second reading, it no longer struck me as insolent. Instead, I was amazed at how courageous the authors were for exposing so much of themselves, putting an intimate conversation out in public. Besides, a lot of what they are saying is quite important, quite true. But why do it that way?

I decided to read *Roll Over Beethoven* as a piece of neo-Kantian modernism. And points like these began to stand out:

(1) Why is a transcript an inferior form of scholarship to a didactic, heavily footnoted article? The purpose of scholarship is the com-

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42. *Id.* at 7.

43. L. STEINBERG, *supra* note 4, at 13.

munication and exploration of thought; why is the solitary research effort a better form of such endeavor than an intense conversation between two scholars who have a lot in common? *Roll Over Beethoven* throws into question the (quite un-Socratic!) presupposition of traditional scholarship that a monologue is a better vehicle of thought than a dialogue. And a dialogue, in turn, implies a kind of ethical relationship between its interlocutors quite different from the author-reader relationship. (And it is too, too perfect that the editors of the *Stanford Law Review* added their own footnotes to try to tame their unruly article — footnotes explaining, for example, that “body snatchers” and “pods” are references to the film *Invasion of the Body Snatchers*.)

(2) *Roll Over Beethoven* confronts us with the question of whether it actually is the transcript of a taped conversation between its authors, rather than a composed dialogue between the literary personae “Peter” and “Duncan” — whether, to put it another way, it is a (mere?) mechanical production or the product of composition and virtuosity. The invidious contrast raised by this question is, of course, the site of a battle which photography had to win in the last century to be accepted as art, and which a variety of modernist productions have fought ever since; and overcoming the contrast may well have changed forever our concept of what an art object is.<sup>44</sup>

The contrast, however, must be overcome anew every time a mechanical production process raises the worry that a piece is fraudulent. In the case of *Roll Over Beethoven* it seems to me that the contrast between mechanical production and virtuoso composition makes no difference. I do not believe that we would admire the work more if we learned that it was through-composed rather than taped and transcribed. Nor (on the other side of the ledger) would it invalidate the moral point of the dialogue form if we learned that the article was carefully written, rather than spontaneously uttered in the heat of conversation. This, I think, shows that it is a successful modernist piece. Like the first art photographs (or the film *My Dinner with André*,<sup>45</sup> which *Roll Over Beethoven* in many ways resembles), it demonstrates its nonfraudulence by making the question seem irrelevant. To overstate the matter: *Roll Over Beethoven* begins to change the whole way we think of a scholarly article.

(3) The dialogue form perfectly exemplifies the first of Unger’s modernist theses: “[O]ur dealings with other individuals have pri-

44. The great discussion of this issue is W. BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 219-53 (1955); see also Benjamin, *Walter Benjamin’s Short History of Photography*, ARTFORUM, Feb. 1977, at 46, 46-47.

45. New Yorker Films 1981.

macy over the search for an impersonal reality or good. And among all encounters [modernists] ascribe special importance to those that put in question the relation between the requirements of self-assertion."<sup>46</sup>

(4) Many people find one of *Roll Over Beethoven*'s most irritating features to be its serene presumption that the reader is interested in the minutiae of CLS internal debates and uncritically committed to the same radical values as CLS. (The piece is monumentally uninteresting to those for whom this presumption is false.) But — and this is a question that I take the piece to be inviting — what makes *Roll Over Beethoven* different in this respect from more standard law review fare? Most law review articles, after all, presume that the reader is interested in the minutiae of standard technocratic policy debates and is uncritically committed to the blandly centrist values they presuppose. It is just that we have become so habituated to these presumptions that we do not notice them. *Roll Over Beethoven* makes us notice them.

(5) The subject of much of *Roll Over Beethoven* is the exile-motif, the unfulfilled desire for solidarity, for unalienated relatedness, for intersubjective zap. In part the dialogical form of *Roll Over Beethoven* is supposed to illustrate what it is that we're missing; but in part it is supposed to illustrate that Duncan and Peter are missing it too.

In one crucial passage in the dialogue, Duncan and Peter are discussing a conversation some people had at CLS summer camp(!). Peter takes that conversation to be illustrative of the kettle boiling: "Everyone in the room was participating, intensely interested, and there." Duncan replies noncommittally, "I remember it clearly";<sup>47</sup> Peter goes on with an analysis; and Duncan comes back as follows: "Here's what I remember about what made it a wonderful and dramatic occasion. I think this may be quite different from your memory of it. My memory may be wrong. I think the discussion was actually not a satisfactory discussion; people were not feeling good . . . ."<sup>48</sup> (He then goes on to explain what eventually made it animated.)

Nothing is more jarring than having someone tell you that an important memory is haywire. Indeed, if anything could count as a theme for early modernist literature, it is the elusiveness and importance of memory, the uncontrollable and unpredictable window it offers us, the solitude of being trapped in memory, as well as the solitude

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46. R.M. UNGER, *supra* note 2, at 35; see text at note 14 *supra*.

47. Gabel & Kennedy, *supra* note 37, at 12.

48. *Id.* at 13.

of being debarred from it. At this moment in the conversation, Duncan and Peter confront vividly a major component of the exile-motif — in Unger's words cited previously, "skepticism about the possibility of . . . gaining access to another mind" (or even one's own mind).<sup>49</sup>

(6) The dialogue form of *Roll Over Beethoven* invites the reader to question his or her own relationship to the conversation in the article. They are talking, I am (merely?) reading/beholding/eavesdropping. Is reading/beholding/eavesdropping — the partaking of the fruits of others' theoretical labor at a distance — itself a kind of alienation? (Notice that this question is one construal of the subject matter of the dialogue: form and content fit perfectly together.) *Roll Over Beethoven* acknowledges the beholder in a modernist — that is, iconoclastic — way.

Much more could be said about *Roll Over Beethoven*, but there is no need to labor the point further. In my view, *Roll Over Beethoven* is a successful modernist achievement. It keeps working on you after you have set it aside.

## V

Modernism is self-critical and iconoclastic. Under its neo-Kantian interpretation, however, I have claimed that it amounts to much more (or less) than an undifferentiated negation of the premodernist tradition. It is a determinate negation of premodern art, accepting premodernism's claim to quality, denying only its power to maintain conviction now, aiming to attain premodernism's level of achievement by disassembling its constitutive conventions piecemeal.

There is another interpretation of modernism, however, one that is more in line with the leftist and counterculture sensibilities of CLS, but which I wish to criticize and warn against. For want of a better term, I shall use Greenberg's and call this the "avant-gardist interpretation."<sup>50</sup> (Greenberg means the word "avant-gardist" — as distinct from "avant-garde" — pejoratively.)

Avant-gardism wants to bury the past, not criticize it. It proceeds from the premise that respect for the achievements of premodernism is itself suspect — perhaps because respect is produced by suspect ideology, or because premodernist achievements are too implicated in cultural values that the avant-gardist wants to smash. Avant-gardism

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49. See text at note 17 *supra*.

50. Greenberg, *Counter-Avant-Garde*, ART INTL., May 20, 1971, at 16.

relishes the Shock of the New because it relishes shock and it relishes novelty. It doesn't trust anything over thirty.

Avant-gardists practice a version of modernism that Unger criticizes as a "heresy" from the legitimate modernist teaching.

Their divinization of the self has often led them to pass from the conviction that the person transcends his contexts to the intolerance of all limits, whether the constraints of the body or those of society. . . . [The individual] can assert his independence only by a perpetual war against the fact of contextuality, a war that he cannot hope to win but that he must continue to wage.<sup>51</sup>

(Unger himself calls in *Passion* for a modernist reconstruction of a very traditional picture of personality, and in *The Critical Legal Studies Movement* for a "deviationist" reconstruction of extant legal doctrine. This willingness to make the premodernist past his starting point marks these as neo-Kantian rather than avant-gardist works.)

The avant-gardist interpretation sees modernism primarily as cultural-revolutionary context-smashing — as the attempt to do away with art rather than find new ways to make it. It does not care to disassemble an art's constitutive conventions, so that through their absence we can understand what their presence meant; it simply wants to destroy them. Growing out of Dada and Surrealism, avant-gardism achieved something of a mass following in the 1960s and 1970s in the form of Happenings, multi-media art, some Pop Art, some rock, some punk and New Wave.

I will shortly consider the impulse to avant-gardism a bit more deeply and suggest that this impulse is realized in some of the "postmodernist" theory utilized by CLS scholars. First, however, I want to ask why the avant-gardist interpretation of modernism is attractive to those of left political views, including CLS.

One of the attractions of avant-gardism to leftists is its association with the cultural-revolutionary political sensibilities of the 1960s. I do mean "sensibilities," for avant-gardism was evinced more in the style of the sixties than in the substance of the political issues leftists addressed (Vietnam, race, women's liberation).

As an example of this sensibility, one might consider the "Situationist International" (IS), a small post-Surrealist group that began in France in 1958 and made a deep imprint on the colossal upheaval of May 1968. The IS, through its journal and the prolixity of its theoreticians, left behind it a formidable body of dense radical theory;<sup>52</sup> but — as the Situationists themselves would have wanted it — it is through

51. R.M. UNGER, *supra* note 2, at 36.

52. See, e.g., G. DEBORD, *LA SOCIÉTÉ DU SPECTACLE* (1968); R. VANEIGEM, *TRAITÉ DE*

their slogans and style that the IS is remembered. It was the Situationists who gave Parisian students, prying up cobblestones to make barricades, their slogan "*Sous le pavé, la plage*" ("Under the paving-stones, the beach!"). They covered the walls of the universities with other slogans inspired by artistic modernism: "The sky will not be blue again until we reinvent it"; "Power to the imagination!"; "Poetry in the streets." One finds a good deal of Situationist language in Unger, who frequently appeals to us to "invent" or "imagine" new forms of social existence, as though the rightful successor to law will be art.

More memorably, the IS created what became the cliché format of leftist publications (employed by CLS members in the "alternative" newspaper they distributed at the 1984 convention of the Association of American Law Schools): Pop-style single cartoon-strip panels, fragments of old drawings, collages of advertising slogans snipped out of context. The mix of Pop, mass-culture icons, and black humor that we associate with sixties leftism emerged in large part out of the obscurities of aesthetic theories forged in the furnaces of post-Surrealism in the late 1950s. And for those whose political sympathies lie with the residues of sixties leftism, it is natural to find affinities with its avant-gardist roots.

A second point of affinity between avant-gardism and a leftist political sensibility may be found in the aesthetic doctrines of the Frankfurt School, so-called "Critical Theory." Critical Theory has had an influence upon CLS, as the similarity in names suggests, and it accords avant-gardism an important political role. This may be seen in the most influential book by the Frankfurt School's most influential member — Herbert Marcuse's *One-Dimensional Man*,<sup>53</sup> one of the "must-read" texts of the New Left.

Marcuse's basic argument is well known. The "technological rationality" of advanced capitalism swallows up all modes of discourse, including oppositional discourse. It provides spurious legitimation by means of a soulless hellfire of advertising images which canalize all our urges for a truly human freedom into desires for commodities that capitalism can satisfy. By making even opposition "one dimensional," it ensures that truly fundamental opposition cannot gain a toehold. And since rationality has become one dimensional, it follows that our last hope, true opposition or "negation," must assume the guise of the irrational.

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SAVOIR-VIVRE À L'USAGE DES JEUNES GÉNÉRATIONS (1967). The issues of the journal are republished in INTERNATIONALE SITUATIONNISTE 1958-69 (1975).

53. H. MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY (1964).

Art plays a crucial role, for "art contains the rationality of negation. In its advanced positions, it is the Great Refusal — the protest against that which is."<sup>54</sup> This, according to Marcuse, has always been true, even in the case of premodernist art which was in harmony with its society's ideals: "[A]lienation characterizes affirmative as well as negative art."<sup>55</sup> But now, in one-dimensional society, "[a]rtistic alienation succumbs, together with other modes of negation, to the process of technological rationality."<sup>56</sup> And that is where the avant-garde comes in. It is the final revolutionary stronghold against one-dimensionality:

[C]ontradiction . . . must have a medium of communication. The struggle for this medium, or rather the struggle against its absorption into the predominant one-dimensionality, shows forth in the avant-garde efforts to create an estrangement which would make the artistic truth again communicable.<sup>57</sup>

In itself, there is nothing in this last sentence incompatible with a neo-Kantian interpretation of the avant-garde; the sentence amounts only to an explanation of why it has become necessary to go modernist. What is avant-gardist in the aesthetics of *One-Dimensional Man* is rather the demand that the artist always remain oppositional (ideally "art would become a technique for destroying this business and this misery"<sup>58</sup>) — the dread of cooptation that becomes the badge of the Great Refusal. Marcuse ends his book romantically, with a veritable Oath of the Horatii:

The critical theory of society possesses no concepts which could bridge the gap between the present and its future; holding no promise and showing no success, it remains negative. Thus it wants to remain loyal to those who, without hope, have given and give their life to the Great Refusal.<sup>59</sup>

This theme is strikingly echoed in CLS by Mark Tushnet, who writes: "One sides with the party of humanity because it is defined as the party in opposition to what exists."<sup>60</sup> And again: "And what if things change? If there is no transcendent humanity, when things change all that will be left is to remain in opposition."<sup>61</sup>

Marcuse's views are not entirely consistent with avant-gardism, for

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54. *Id.* at 63.

55. *Id.*

56. *Id.* at 65.

57. *Id.* at 66.

58. *Id.* at 239.

59. *Id.* at 257.

60. Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1398 (1984).

61. *Id.* at 1402.



Marcuse grants validity to premodernist art; he is respectful of an art's past in a way that avant-gardists are not.<sup>62</sup> But — and this is a third affinity between avant-gardism and the left — Marxism is in obvious ways the most important leftist theory, and Marxism itself suspects that to respect the past even a little is to be swindled by an ideology that will merely deflect and coopt the revolutionary impulse. In Marx's words:

The tradition of all the dead generations weighs like a nightmare on the brain of the living. And just when they seem engaged in revolutionising themselves and things, in creating something that has never yet existed, precisely in such periods of revolutionary crisis they anxiously conjure up the spirits of the past . . . .

. . . .

The social revolution . . . cannot draw its poetry from the past, but only from the future.<sup>63</sup>

Within CLS, I believe that this avant-gardist impulse is reflected in the practice of "trashing" traditional legal theory,<sup>64</sup> but even more strikingly in the wholesale rejection of the concept of rights as — in Mark Tushnet's words — "affirmatively harmful to the party of humanity."<sup>65</sup> The appeal to rights is simply another nightmare on the brain of the living, another attempt to draw poetry from the past. And — the avant-gardist believes — there was no poetry in the past worth talking about.

I wish to pursue the topic of the CLS "critique of rights" a bit further, even though my primary aim in this essay is not to engage with substantive CLS positions. It may be objected that my assimilation of the rights critique to avant-gardism begs the question. Perhaps the moral vocabulary of rights really *is* unnecessary and harmful; perhaps rights-talk is more like racism and sexism — things our culture would be well rid of — than it is like art or music.<sup>66</sup> In that case, the

62. How little sympathy Marcuse actually had for avant-gardism and cultural revolution may be seen from H. MARCUSE, *Art and Revolution*, in COUNTERREVOLUTION AND REVOLT 79 (1972); H. MARCUSE, *THE AESTHETIC DIMENSION: TOWARD A CRITIQUE OF MARXIST AESTHETICS* (1978). I take these works to be partial abandonments of the aesthetic views expressed in *One-Dimensional Man*.

63. K. MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 13, 16 (1957) (1st ed. New York 1852).

64. I take the term from Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

65. Tushnet, *supra* note 60, at 1384; see also Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563 (1984). The gap between the radical theorist's rejection of rights and the practical needs of radical politics is well illustrated by Staughton Lynd's worry that if CLS is correct and rights-talk is abandoned it will be impossible to achieve some very important ends of political organization. Lynd, *Communal Rights*, 62 TEXAS L. REV. 1417 (1984) (see especially pages 1417-29).

66. I owe this formulation to Robin West.

assault on rights is part of a legitimately neo-Kantian (rather than avant-gardist) modernist program. But I do not think this is so.

The primary aim of the CLS critique of rights is to debunk the idea that legal rights are politically neutral — that they form a fixed and determinate coin of the realm, by means of which the business of legal controversy may be transacted without bias grounded in either the identity or the group membership of the parties. CLS critics wish to stress that judges typically manipulate the vocabulary of legal rights so as to favor existing hierarchies.

Suppose we agree that this is true; there would then be several routes we could take in order to explain the phenomenon. One route is to conclude that when this happens the judges are violating their duty, because they are ideologically or personally biased against certain groups, or because (as Tocqueville believed) lawyers are better friends of order than of liberty, or because in their interest-balancing the interests of powerful groups always take precedence over those of less powerful. A second route is to argue (in the fashion of Beard) that the particular set of legal rights contained (say) in the United States Constitution is biased in any or all of these ways.

CLS rights-critics, however, choose a more audacious and theoretically rarefied route, and therein lies their avant-gardism. They claim that the problem lies neither in the judges nor in the particular schedule of legal rights currently in effect, but rather in the vocabulary of rights as such. In claiming this, they are at once committed to discarding eight hundred years of legal and moral language, and to suggesting that controversy could be conducted in some alternative vocabulary.

The idea of scuttling whole segments of our vocabulary — the poetry of the past — has enjoyed considerable attention recently.<sup>67</sup> But what does it mean to abolish the whole language of rights? What would a new language look like?

To address these questions, we need to ask what communicative purpose the language of rights serves. I believe the answer is this: the claim to have a right to a substance is simply the speaker's way of asserting an especially strong claim to that substance.<sup>68</sup>

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67. See A. MACINTYRE, *AFTER VIRTUE* (1981); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979); R. RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985); see also Cornell, *supra* note 3.

68. I follow Henry Shue in defining the "substance" of a right as "whatever the right is a right to." H. SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 15 (1980).

That is, we may (roughly) analyze a claim couched in rights-talk as follows:

"A has a right to S" means that:

- (i) There are valid reasons for guaranteeing that A gets S;
- (ii) These reasons are among the strongest reasons we acknowledge (*i.e.*, in most but not all contexts they are decisive reasons);
- (iii) These reasons are relatively long-term (*i.e.*, they are not the ad hoc creatures of political expediency or momentary or fortuitous constellations of events).<sup>69</sup>

And that is all: my claim that I have a right to a substance is a claim that there are very strong, long-term reasons for guaranteeing me that substance.<sup>70</sup>

If that is the communicative function of a rights-claim, what does it mean to abolish rights-talk? Does it mean getting rid of the word "right," the vocabulary of rights? In that case, we shall simply need to invent a new word to register claims that there are very strong, long-term reasons for guaranteeing us a substance.

Since there is evidently no point to a merely nominal change, the rights critique must instead mean something more fundamental: that there should *be* no rights, *i.e.*, that there *are* no strong long-term reasons we can invoke for guaranteeing us any substances. The demand for a priori guarantees against political change is itself unreasonable, and no substance should be held immune, even relatively immune, from political conflict over its distribution. This I take to be very close to the CLS critics' bottom line on rights; but then I return to my initial conviction that it is an avant-gardist vision. For now every fixed form of life becomes fluid, and no distribution can ever be taken for granted. Stable or dependable contexts *as such*, and the history that gives rise to them, are the enemy. All that is solid melts into air.

## VI

It is probably evident that I am no fan of the avant-gardist interpretation of modernism. What are my reasons?

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69. *Id.* at 13. Shue's analysis of a right is somewhat different.

70. Notice what this analysis does *not* say. It does not say that the right-bearer is an individual; so it is neither "individualistic" nor biased against group rights. It does not say that rights are absolute. It does not say that rights are ahistorical (only that when they change, it will not be overnight). It does not say that rights are (like) property of their possessors, nor that rights are things. The analysis does not elevate claims of rights into dubious premises of political arguments; rather it insists that they are conclusions of such arguments. And so, people who talk rights-talk are not committed to individualism, absolutism, ahistoricism, property-worship, reification, or obfuscation. On the contrary, it is the rights critics who appear to be misled by a form of speech into reifying fictitious entities.

The most important, of course, is that I revere too much of the past — too much art, too much history, too many ideals and institutions — to have any real sympathy with the avant-gardist sensibility. This, however, is not an argument, and I do not offer it as one. Clearly it begs the avant-gardist's question. And one can surely understand why someone who has keenly experienced our culture's pervasive patriarchy or racism might abominate its cultural products, which are shot through with the offending attitudes.

Nevertheless, it seems to me that it is virtually impossible for a person to live sanely in (to use Unger's words that I have cited above) "a perpetual war against the fact of contextuality, a war that he cannot hope to win but that he must continue to wage."<sup>71</sup> Our lives, our experience, our language, and our modes of relationship are permeated with contexts given by the past, and permanent context-smashing is not merely spiritually exhausting, it is destructive of sense. To reject the whole of one's culture is to be out of one's mind.

It is hardly a coincidence that avant-gardism's pantheon is heavily stacked with mad artists and thinkers (Hölderlin, Nietzsche, Lautréamont, Sade, Artaud).<sup>72</sup> The Situationists were pleased to number the crazed poet Ivan Chtcheglov in their charter membership.<sup>73</sup> One thing that I find distressing in avant-gardism is that it toys too readily with the desirability of extreme experience; lunacy may be Politically Correct. As Marcuse argues, "[T]he realm of the irrational becomes the home of the really rational — of the ideas which may 'promote the art of life.'"<sup>74</sup> A passage from Michel Foucault elaborates this theme:

After Sade and Goya, and since them, unreason has belonged to whatever is decisive, for the modern world, in any work of art . . . .

. . . .

Ruse and new triumph of madness: the world that thought to measure and justify madness through psychology must justify itself before madness, since in its struggles and agonies it measures itself by the excess of works like those of Nietzsche, of Van Gogh, of Artaud.<sup>75</sup>

Now, one may well admire or even love the works of Nietzsche or Van Gogh; one may also believe that without their madness these works

71. R.M. UNGER, *supra* note 2, at 36; see text at note 51 *supra*.

72. Wholly characteristic of avant-gardism's infatuation with insanity is G. DELEUZE & F. GUATTARI, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* (1977). In fact, avant-gardist leftism vacillates between denouncing our society for creating schizophrenics and glorying in the schizophrenic experience. See R.D. LAING, *THE POLITICS OF EXPERIENCE* (1967); M. FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (1965).

73. Chtcheglov, *Lettres de Loin*, 9 INTERNATIONALE SITUATIONNISTE 38 (1964).

74. H. MARCUSE, *supra* note 53, at 247.

75. M. FOUCAULT, *supra* note 72, at 285, 289.

could not exist. But this does not imply that manic intensity is a state one should seek, any more than the fact that Schubert was inspired to write great music by the knowledge that he was dying implies that mortal illness is a state one should seek.

It will be objected that I greatly exaggerate the importance of avant-gardist toying with madness. But this is to mistake the point. Few would deny that avant-gardism makes the quest for extraordinary spiritual states, the rhetoric of violence, and contempt for bourgeois normality centerpieces of its world view; and my point is that when you have done that, unwanted consequences pursue you no matter what your intentions.

I am moved to raise these concerns in part by the great interest evinced by CLS theorists in "postmodernist" French philosophy, especially the work of Foucault and Jacques Derrida. For it seems to me that French postmodernism is a primary culprit in the game of glib flirtation with a rhetoric of extremity and violence. Foucault, in particular, chose to write in a very menacing idiom; one need think only of the apocalyptic conclusion of *The Order of Things*:

[M]an is an invention of recent date. And one perhaps nearing its end.

If . . . some event of which we can at the moment do no more than sense the possibility . . . were to cause [our categories of knowledge] to crumble, . . . then one can certainly wager that man would be erased, like a face drawn in sand at the edge of the sea.<sup>76</sup>

A similar example is Derrida's essay *Tympan*, which is written in a dense and virtually incomprehensible prose permeated with imagery of ravishment,<sup>77</sup> of forcible cunnilingus,<sup>78</sup> of bursting the philosopher's palate from within his mouth,<sup>79</sup> of vocal cords being shattered and earwigs piercing the eardrum.<sup>80</sup> (It also includes the mandatory, inevitable, tedious references to Lautréamont's *Chants de Maldoror*<sup>81</sup> and to Artaud.<sup>82</sup>)

76. M. FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* 387 (1970).

77. J. DERRIDA, *Tympan*, in *MARGINS OF PHILOSOPHY* xxv-xxix (1982). This passage is an extended sexual *double-entendre* based on images of a printing-press puncturing fastened-down silk, which "watches over its margins as virgin . . . space." *Id.* at xxvii.

78. *Id.* at xviii n.9: "[T]he bloodiness of a disseminated writing comes to separate the lips, to violate the embouchure of philosophy, putting *its* tongue into movement . . ." That the "lips" referred to are the "small lips of the vulva" is explained at xvii n.9, as well as at xiv n.6.

79. "To luxate, to tympanize philosophical autism is never an operation . . . without some carnage of language. Thus it breaks open the roof, the closed spiral unity of the palate. . . . It is no longer *a* tongue." *Id.* at xv n.8.

80. *Id.* at xvi-xviii (Learis' poem in the margin).

81. *Id.* at xiii.

82. *Id.* at xv n.8.

Why write like this? *Tympan* offers an important clue to understanding the root impulse of avant-gardism. Derrida takes as his text in this essay three self-satisfied passages from Hegel suggesting that philosophy includes everything else within it. Derrida finds this unbearable, and his purpose in writing *Tympan* is to exemplify a kind of discourse that philosophers cannot "hear" as philosophy, and thus "to luxate [dislocate] the philosophical ear."<sup>83</sup> (Hence the images of violence performed on the head.)

Derrida's problem is that Hegel is right: philosophers cannot "hear" any criticisms without turning them into philosophical theses, and thus the attempt to criticize the very idea of philosophical theses is doomed from the outset because philosophy has stacked the deck. Derrida's solution is to carve out an idiom so odd and obscure that it cannot be rationally reconstructed into philosophical theses, and to make it an attack on philosophy through the repeated use of violent images directed at philosophy.

At work here is the impulse to "do" work in philosophy that is not *just some more philosophy*, that cannot be pigeonholed, incorporated into philosophy's history, co-opted; work that cannot become last week's news, that will never be supplanted by something else, never *aufgehoben*.

This is a deep motivation of avant-gardism. The first issue of the Situationists' journal was bound in sandpaper covers, so that you couldn't put it on your bookshelf without damaging the books next to it. An unshelvable book! An unassimilable piece of philosophy! An unco-optable political movement! A painting that can never become a footnote in an art-history dissertation! A social structure that nobody could possibly oppose! It is exciting prospects like these that inflame the avant-gardist imagination.

The root impulse of avant-gardism, I believe, is the impulse to end history, or at least one's epoch in it — to achieve the achievement that ends all achievements. Derrida wants to finish off metaphysics ("phallogocentrism," as he calls it in his ugly jargon). Foucault wants to terminate subjectivity. Successive generations of avant-gardist artists want to end art. CLS rights-critics want to abolish legalism.

CLS theorists often promote this way of thinking as necessary utopianism. I think of it as a kind of messianic impulse in modernism. The modernist, unable to rest content with the contexts in which we

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83. *Id.* at xv. I have been greatly helped in understanding *Tympan* by reading (and discussing with her) Deborah Hellman's Dartmouth College bachelor's thesis on Derrida.

live, wants finally to be redeemed from all contextuality. No intermediate way station between us and the messiah is bearable.

This (quite understandable) impulse is deceptive, however, because we would feel it whether or not the messiah was imminent. Kant noted the bitterness of the idea of gradual progress, the idea

that the earlier generations appear to carry through their toilsome labor only for the sake of the later . . . and yet that only the latest of the generations should have the good fortune to inhabit the building on which a long line of their ancestors had . . . labored without being permitted to partake of the fortune they had prepared.<sup>84</sup>

It is precisely this melancholy thought that kindles the messianic yearning, the inevitable yearning to *be* that "latest of the generations."

The impulse is dangerous because it leads us to treat the messianic moment as a goal at which we can aim. But since such a moment by definition involves a drastic rupture with all the preexisting contexts we use to make sense of things, we cannot take it as a goal because it has no content at all. Our aims are of necessity modeled on what we can know, and that, like it or not, entails giving the ghost of dead generations its due — modeling one's achievement on past achievements, aiming at amelioration rather than annihilation, leaving open the possibility of being co-opted.<sup>85</sup> (I take this neo-Kantian caution to be one of Unger's main points in *Passion* and *The Critical Legal Studies Movement*.)

For all these reasons, then, I think we should favor the neo-Kantian over the avant-gardist interpretation of modernism. I do not deny avant-gardism's allure; I urge only that, by hurling us into combat to revalue all values, avant-gardism imposes unlivable, deceptive, and spiritually destructive requirements on us.

The Situationist International shrank as its members were expelled for ideological deviations. Legend has it that it dissolved when the last two members met in a café and agreed to expel themselves because they, too, had sold out.

## VII

One of the more obscure of the Situationist slogans was "Create situations!" The first issue of their journal defined a "constructed situ-

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84. I. KANT, *Idea for a Universal History from a Cosmopolitan Point of View*, in *ON HISTORY* 14 (1963).

85. I draw the argument of this paragraph from W. BENJAMIN, *Theologico-Political Fragment*, in *REFLECTIONS* 312, 312 (1978): "From the standpoint of history [the Kingdom of God] is not the goal, but the end. . . . The order of the profane should be erected on the idea of happiness."

ation" as a "moment of life, concretely and deliberately constructed by the collective organization of a unitary ambiance and a play of events."<sup>86</sup> Situationism was to be a kind of multi-media guerrilla theater.

But there is something wrong with being theatrical outside the theater — or even in the theater, if we are to believe the modernist theorists Brecht and Artaud. Think, for example, of what we mean when we accuse a friend of posturing, of being theatrical, in personal life. One of the most important facts about art works is that (in Cavell's words) "we treat them in special ways, invest them with a value which normal people otherwise reserve only for other people — *and* with the same kind of scorn and outrage."<sup>87</sup> It is because art matters to us in ways that people matter to us, and because one way an art work (like a person) can betray us is by posturing, that the theatricality of art is an important issue.

Fried argues in his crucial neo-Kantian essay *Art and Objecthood* for two theses: "1) The success, even the survival of the arts has come increasingly to depend on their ability to defeat theatre. . . . 2) Art degenerates as it approaches the condition of theatre."<sup>88</sup> This seems mysterious, until we realize that the theater is defined by two conditions: it involves play-acting, and it depends for its success on self-consciousness, even hyper-awareness, of the way the performance looks to the audience. And Fried's criticism can be understood thus: When a work of modernist art rests its claim to our attentiveness on theatrical effects, it operates merely by manipulating our situation; it achieves notoriety without achieving quality. It fails in the way that I have suggested is characteristic of modernist art: it is (not mediocre but) fraudulent.

One can readily imagine examples of purely theatrical modernist works: a sculpture that depends for its effectiveness on sheer size, a light so bright that you can't look at it, music that has nothing going for it but high volume. Each of these may attract attention in the art gallery or concert hall; each may be defended with passionate aesthetic arguments; but, in the end, each depends for its effectiveness on something that is aesthetically irrelevant. Though it can compel our attention, theatrical art does not reward our attentiveness.

Avant-gardist work, I believe, is inherently theatrical; it glories and exults in the theatrical, for its claim to status as a political force is

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86. 1 INTERNATIONALE SITUATIONNISTE 13 (1958) (translation provided).

87. S. CAVELL, *supra* note 9, at 198.

88. Fried, *Art and Objecthood*, *supra* note 26, at 139, 141.



that it confronts us in our situations — it (re)creates situations. But, if the neo-Kantian arguments I have advanced in this essay are sound, this is no virtue. This point bears emphasis. I have claimed that modernism's mode of failure is inauthenticity or theatricality; and I am now suggesting that theatricality is characteristic of avant-gardist work. Thus, my suggestion amounts to the claim that avant-gardism is one shape modernism assumes when it fails.

### VIII

It is time, finally, to say a bit more explicitly what the significance is of modernism, and of the distinction I have drawn between neo-Kantianism and avant-gardism, for law and social theory.

Let me make one point clear: *My criticisms of avant-gardism are not intended as criticisms of radical leftist politics, only of an interpretation of such politics.* It should be evident, in fact, that I have been assuming throughout this essay that modernism is roughly correct: that the social contexts in which we organize our activities (and now we may think of legal and social systems) are no longer able to sustain the conviction of their own legitimacy, and hence, that they demand a more-or-less drastic criticism and revision. Many people will disagree with this; and, though this essay is surely not the occasion for undertaking a defense of this critical stance, a few remarks may be appropriate.

Let us follow the procedure of this essay and break the modernist thesis down into two components — the moral criticism of pre-modernism's dissembling conventions and the exile-motif. The exile-motif is itself a conjunction of two ideas, which I have labeled "homelessness" (*i.e.*, in any given context) and "isolation" (*i.e.*, from each other). I will treat these three concepts in reverse order.

*Isolation.* The isolation thesis in social theory is familiar as an avant-gardist claim — raised by a variety of social critics, including perhaps its most drastic formulation in Debord's Situationist tract *La Société du Spectacle*<sup>89</sup> — that we are a "lonely crowd," leading lives of quiet desperation, irretrievably alienated from each other. In legal theory, it may be found in Gabel's argument that when we understand our mutual relationships legalistically (*e.g.*, as an interplay of rights) we become "withdrawn selves" engaged in a desperate prevarication.<sup>90</sup>

But many of us are inclined to protest this avant-gardist diagnosis of our condition: rumors of our demise are, we think, exaggerated.

89. See G. DEBORD, *supra* note 52.

90. Gabel, *supra* note 65.

Our encounters may appear "alienated," after all, only because we now have a richer variety of them; and we may seem like bad-faith role-players, Sartrean café-waiters, only because the social theorist doesn't really get to know us. We play a variety of roles, after all, and it is small wonder that to the superficial observer — particularly one determined to find something wrong — no one of them seems more than a caricature of a person.<sup>91</sup> (Consider this example from Marcuse: "The subway during evening rush hour. What I see of the people are tired faces and limbs, hatred and anger. . . . [M]ost of them will probably have some awful togetherness or aloneness at home."<sup>92</sup> How the hell does *he* know?)

I propose a more plausible neo-Kantian version of the isolation thesis. The great variety of our roles and encounters are in themselves neither causes nor symptoms of alienation. Rather, as our field of awareness and communication widens we become more conscious of social conflict, because we become more aware of people who are different from us; and this heightened awareness of conflict may itself estrange us from each other. Disillusionment about the existence of consensus can actually accelerate the unraveling of whatever consensus there is. The problem is not alienation, but strife.<sup>93</sup>

This is one aspect of the problem that Unger describes as our heightened awareness of "contextuality." By that he means that we are more conscious of other people's membership in interest groups or social classes in conflict with ours; we see these contexts as conditioning their behavior. And to that extent we mistrust them. ("They only say that because they are *X*.") The avant-gardist's alienation thesis may be only a conjecture; but I take it as a plain fact that ours is a wary age.

And wariness, mistrust, is a form of isolation. Those we do not trust we hold at arm's length, and an arm's-length society makes everything difficult for itself. In fact, as Luhmann has written, "a complete absence of trust would prevent [one] even from getting up in the morning."<sup>94</sup>

Noticing the social centrality of trust leads us directly to consider one way that the theme of isolation can be raised in legal theory. Re-

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91. These replies come from N. LUHMANN, *GRUNDRECHTE ALS INSTITUTION: EIN BEITRAG ZUR POLITISCHEN SOZIOLOGIE* 50-51 (1965).

92. H. MARCUSE, *supra* note 53, at 227.

93. For an enlightening CLS discussion of the loss of consensus in modern liberal society, see R.M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 166-70 (1976).

94. N. LUHMANN, *Trust: A Mechanism for the Reduction of Social Complexity*, in *TRUST AND POWER* 1, 4 (1979).

cently, in a pair of suggestive and important essays, the philosopher Annette Baier has argued that *trust*, not *obligation*, is the root phenomenon upon which moral theory should focus.<sup>95</sup> The legal surrogate for trust — enforceable obligation — itself amounts, after all, simply to trusting enforcement authorities more than one trusts one's obligor, and so enforceable obligation itself is nothing but a special case of trust. (A society of Holmesian Bad Men is an impossibility because the enforcement authorities, and those who monitor them in turn, would also be Bad Men; Holmes inconsistently presupposed that, somewhere in the governmental apparatus, there would be Good Men, that is, trustworthy men.)

Baier speculates that obligation, contract, and voluntary agreement came to be seen as paradigms of liberal morality because the (male!) moralist took as his paradigm of social intercourse

cool, distanced relations between more or less free and equal adult strangers, say, the members of an all male club, with membership rules and rules for dealing with rule breakers and where the form of cooperation was restricted to ensuring that each member could read his *Times* in peace and have no one step on his gouty toes.<sup>96</sup>

This emphasis on "cool, distanced relations between free and equal adult strangers" may or may not correctly characterize moral theory, but it surely characterizes legal theory; and so, if Baier is right, to understand ourselves in the terms of legal theory is to understand ourselves in a way that ignores and undermines the trust that actually makes the world go 'round. Legal theory partakes of isolation, in short, because its central concepts are based on a paradigm of arm's-length relationships between adults — a paradigm of isolation.

My emphasis on mistrust and strife as the components of modernist isolation is neo-Kantian because, unlike the avant-gardist's focus on desperation and metaphysical estrangement, it builds its radical vision on a determinate content: trust and agreeableness, after all, are ideals that we understand and live with every day. The avant-gardist, by contrast, must hold out to us as an ideal the end of alienation, a messianic and contentless vision of communality.

*Homelessness.* By "homelessness," remember, I am referring to the modernist understanding of contexts — the modernist skepticism that any fixed context, set of roles, or station in life is a natural home for us. In legal theory, the experience of homelessness appears as skepticism that any set of rules, procedures, or reforms will actually

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95. Baier, *Trust and Antitrust*, 96 ETHICS 231 (1986); Baier, *What Do Women Want in a Moral Theory?*, 19 NOÛS 53, 56-61 (1985).

96. Baier, *Trust and Antitrust*, *supra* note 95, at 248.

achieve justice. Unger describes this eloquently as “a basic, common experience in modern society . . . : the sense of being surrounded by injustice without knowing where justice lies.”<sup>97</sup>

Unlike the case of the isolation-motif, here I do not really find a difference between neo-Kantian and avant-gardist interpretations of this experience, unless the avant-gardist interpretation is to be a wholesale skepticism about the concept of justice that I do not see anyone, in or out of CLS, espousing. I will without further discussion maintain that the experience Unger describes is a precise expression in legal theory of the modernist theme of homelessness. And I will assume with Unger that the experience is one that many or most people share.

There is a kind of poetic justice here. The most famous of all modernist novels is Kafka's *The Trial*, which hit upon involvement in a modern legal process as a perfect metaphor for expressing the exile-motif. If anything is to count as a political theme of *The Trial* — as opposed to the obvious theological and existential themes — it is the “basic, common experience in modern society . . . of being surrounded by injustice without knowing where justice lies.” It is hard to forget such images as Joseph K., indicted but unable to discover the crime of which he is accused, or the gatekeeper at the Court closing forever the door to justice that existed only for him. Now we find that the circle has closed. Modernist art such as *The Trial* offers us the truly illuminating metaphors with which to understand the legal system.<sup>98</sup>

*The critique of premodernism.* Modernist art, I have argued, is defined in part by its impulse to subject premodernist work to searing criticism, laying bare its constitutive conventions and displaying the way in which these dissemble about the relationship between art and its beholder.

I find the analogue in the CLS criticism of what are taken to be organizing principles in the various departments of legal doctrine — property, criminal law, etc.

CLS's best-known work has consisted of an attempt to show that liberal legalism has masked the arbitrary character of law by insisting that the acts of will that make it up are themselves responding to principles of sound public policy. Typically, a CLS “deconstruction” of an area of law shows that these principles could as easily have led to a different, opposing, result. And the conclusion of such a critique is the

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97. R.M. UNGER, *supra* note 93, at 175.

98. See, e.g., West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985).

claim that law is indeterminate and thus open to extralegal determination, such as determination by class or gender interest. This fact undercuts law's claim to universality.

I am skeptical of such arguments. The fact that the result of a case does not follow from legal principles as a theorem follows from axioms does not show the absence of determinacy. It shows only the absence of mechanical determinacy. But that is a pretty weak result: it is scarcely surprising to learn that judgments involve judgment-calls, and it is clear that judgment-calls cannot themselves be carried out by mechanically applying rules, on pain of infinite regress — we would need rules telling us how to apply the rules of judgment, and further rules telling us how to apply those, and so on.<sup>99</sup>

The ability to make judgment-calls arises from immersion in a culture, a set of social practices of rule application. The indeterminacy thesis, then, amounts to a mistrust of any such contextually formed capacity. Thus, Joseph William Singer dismisses determination if it arises (merely) from "legal culture, conventions, 'common sense,' and politics. Custom, rather than reason, narrows the choices and suggests the result."<sup>100</sup> Apparently, legal rules cannot be determinate if their application depends in any way on custom or convention.

In fact, however, the regress argument described above shows that *no* rules are determinate under such an austere constraint.<sup>101</sup> This includes rules of language use. And so, if Singer's argument is correct it does not undermine only the possibility of legal discourse; it undermines the possibility of discourse of any sort. A contrast between reason and custom that has such consequences cannot be sustained.

Similarly, Unger argues that legal formalism depends upon the view that words have "plain meanings." This, Unger believes, presupposes a doctrine of "intelligible essences" and is thus incompatible with a "conventionalist" view of language, *i.e.*, a view that makes the plain meaning of words rest on conventions or shared practices. But conventionalism is the modern, *i.e.*, postmedieval, view of nature and

99. This is a point emphasized by both Kant and Wittgenstein. I have discussed their arguments in Luban, *Epistemology and Moral Education*, 33 J. LEGAL ED. 636 (1983).

100. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 25 (1984). My understanding of these issues has been greatly assisted by Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986). For discussion of judgment, see R. BEINER, *POLITICAL JUDGMENT* (1983); H. ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* (1982).

101. Another, related, line of argument leading to the same conclusion is Wittgenstein's "rule-skepticism" in the *Investigations*. L. WITTGENSTEIN, *supra* note 34. For a contemporary discussion, see S. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982), an elaboration of arguments first presented in R. FOGELIN, *WITTGENSTEIN* 138-71 (1976). A criticism of rule-skepticism that is quite germane to the indeterminacy thesis is G.P. BAKER & P.M.S. HACKER, *SCEPTICISM, RULES AND LANGUAGE* (1984).

science, and so formalism is incompatible with a belief in modern science.<sup>102</sup>

Much is wrong in this argument — indeed, everything is wrong in it. First, there is no reason to believe that a scientific world view is incompatible with a suitably sophisticated essentialism.<sup>103</sup> Second, it is untrue that giving up on intelligible essences means giving up on the ability to “subsume situations under rules”<sup>104</sup> as Unger claims: to deny that a judgment subsuming a situation under a rule is *essentially* true is not to deny that it is true, and no classical essentialist ever said otherwise.<sup>105</sup> Third, even intelligible essences — nonconventional linguistic rules — would not help us make such subsumptions unless they too were buttressed by conventions: for our regress argument shows that we would need rules about how to apply those rules, rules about how to apply those, and so on.<sup>106</sup>

Even leaving all this aside, however, the basic objection that I raised against Singer remains. Unger’s attack on the plain meaning of language clearly does not rule out only legal formalism. It rules out all discourse. I take this to be a straightforward *reductio ad absurdum* of the argument.<sup>107</sup>

This part of the CLS critique is, in fact, a version of Unger’s “he-

102. R.M. UNGER, KNOWLEDGE AND POLITICS 92-94 (1975).

103. The best-known contemporary defense of essentialism is S. KRIPKE, NAMING AND NECESSITY (1972).

104. R.M. UNGER, *supra* note 102, at 93.

105. I owe this point to an unpublished review of Unger’s *Knowledge and Politics* by Mark Sagoff.

106. Unger may wish to reply that to call an essence *intelligible* is to assert that it can be applied to its instances without appeal to conventions or further essences, and so the regress problem is avoided. But this was not how the doctrine of intelligible essences was understood in antiquity. Indeed, the regress problem was known to the first philosopher to formulate a doctrine of intelligible essences: it is a version of the so-called “Third Man Argument” in Plato’s *Parmenides* (132a-b). Parmenides asks Socrates this question: You believe that large things are large in virtue of a form [*i.e.*, intelligible essence] of Largeness; in virtue of what, then, will large things and the Form of Largeness all be large? If it is in virtue of another Form of Largeness, we will be confronted with an infinite regress of Forms.

We may understand Parmenides’ argument as a (rough) version of a different question — “You believe in Forms; how can we know that a Form ‘applies to’ a given object, *i.e.*, that a given object participates in that Form?” — and a different answer — “Not by virtue of another Form, on pain of infinite regress!” And this is just the regress argument discussed in the text.

On the interpretation of the Third Man Argument, see the classic Vlastos-Sellars debate: Vlastos, *The Third Man Argument in the Parmenides*, 63 PHIL. REV. 319 (1954); Sellars, *Vlastos and the “Third Man,”* 64 PHIL. REV. 405 (1955); Vlastos, *Addenda to the Third Man Argument: A Reply to Professor Sellars*, 64 PHIL. REV. 438 (1955); W. SELLARS, *Vlastos and “The Third Man”: A Rejoinder*, in PHILOSOPHICAL PERSPECTIVES 55 (1959).

107. Unger’s views about indeterminacy seem to me to be in flat contradiction to his neo-Kantian claim on behalf of deviationist doctrine. If doctrine is always and in principle indeterminate, how would substituting “counter-principles” in doctrine do anyone any good? Doctrine would still be completely indeterminate.

retical" modernist thesis, which I have termed avant-gardist: "skepticism about the possibility of . . . gaining access to another mind." (For what is discourse if not our normal means of gaining access to another mind?) Such skepticism carries with it the mistrust of judgment, since judgments can only be shared, not discursively justified "all the way down." Undercut the ground for sharing another's judgment, and you eliminate the possibility of judgment altogether; no wonder indeterminacy follows. Unger's arguments for indeterminacy violate his own warning against this heresy. Skepticism about other minds may be interesting and important to think about: but we should not take too seriously the prospect that it might be true.

The neo-Kantian version of the critique of doctrine, on the other hand, does not suppose that all doctrinal principles are arid. Instead, it takes as a starting point the ethical ideals supposedly incorporated in the organizing principles of doctrine, demonstrates how they have been distorted in practice to suppress legitimate interests, and tries to show how they are to be worked up to empower, rather than suppress, those interests. This program is what Unger has called "deviationist doctrine,"<sup>108</sup> and it perfectly exemplifies neo-Kantian modernism.

## IX

It may be objected, here or earlier, that in associating CLS writers with avant-gardism I am simply setting up a straw man. I am sympathetic to this objection, and I would like to stress that no CLS writer I have read is simply or flat-footedly avant-gardist. The situation is more complicated than that.

What I find is writings that have an avant-gardist "sound" though they do not make avant-gardist arguments; or that make avant-gardist arguments with neo-Kantian qualifications or reservations; or that back their arguments with citations to avant-gardist works; or (as in Unger) that contain both avant-gardist and neo-Kantian passages.<sup>109</sup> In the end, it may be merely that some CLS writers have retained

108. Unger, *supra* note 1, at 576; for examples, see *id.* at 602-48.

109. For the neo-Kantian side, see Unger, *supra* note 1, at 576-80 (why radicals should be interested in developing, rather than eliminating, legal doctrine), and especially 660-62 (criticizing the "existentialist" version of modernism — Unger's term for what we have called the "avant-gardist" version). For the avant-gardist side, see Unger's call on CLS to thin or eliminate the contrast between reform and revolution, *id.* at 583-84, and especially his call for "an institutional structure . . . that would provide constant occasions to disrupt any fixed structure of power and coordination in social life. Any such emergent structure would be broken up before having a chance to shield itself from the risks of ordinary conflict." *Id.* at 592 (emphasis added). A vision of society in which any attempt to coordinate activities would be preemptively and prophylactically smashed, whether it was harmful or not, is avant-gardism with a vengeance. It is also incompatible with the society's continued existence.

avant-gardist habits of the heart despite having arrived at neo-Kantian belief; or the other way around. In any case, we should not be surprised to find a certain amount of uncertainty and confusion between the two approaches: I have argued above that it is characteristic of modernism that even the artist is uncertain of when she has crossed the line from art to theater, from prophecy to quackery. In the midst of the staggering proliferation of CLS writing,<sup>110</sup> superheated by an unusual amount of media attention, it is inevitable that CLS authors will continue to hurl missiles without knowing until much later where they have landed.

At bottom, the contrast between avant-gardist and neo-Kantian visions of politics is the contrast between permanent revolution and transformation followed by reconstitution. The attraction of the former is exemplified in the attitude of Thomas Jefferson, described by Hannah Arendt as follows:

His occasional, and sometimes violent, antagonism against the Constitution . . . was motivated by a feeling of outrage about the injustice that only his generation should have it in their power "to begin the world over again" . . . . When the news of Shays' rebellion in Massachusetts reached him while he was in Paris, he was not in the least alarmed . . . but greeted it with enthusiasm: "God forbid we should ever be twenty years without such a rebellion."<sup>111</sup>

Jefferson's attitude arises from a desire to stop time at the revolutionary moment, the only moment in which one is truly and demonstrably free.<sup>112</sup> But the desire to stop time is really no different than the desire to end time, to end history — it is the messianic urge I have discussed previously. Let us remember, though, that history is full of false messiahs. And somehow their followers have had to learn how to rebuild a livable world after the rainbow bridge they thought led to paradise had dissolved. The real task of modernist art is only in part to make us discontent with the past: it is also to make art.<sup>113</sup>

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110. Kennedy and Klare's CLS bibliography, already two years out of date, has approximately 600 entries. Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

111. H. ARENDT, ON REVOLUTION 235-36 (1963).

112. See W. BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS 263-65 (1968) (theses xiv-xvii).

113. It would be possible to write a counter-essay to this one, stressing the *dissimilarities* between CLS and artistic modernism. These could be traced in part to the dissimilarities between law and art; and the latter are important. Without in any way attempting to diminish the human significance of art, we should observe that revolutions in art do not have consequences for the character of life in the way that revolutions in law do. Thus, a complete overthrow of traditional art may be disorienting and uncomfortable; a complete overthrow of traditional society could be accomplished only with enormous physical violence. That is why political revolutions are episodic responses to extreme provocations. Permanent revolution in art vacillates between being exciting and tiresome; permanent revolution in society, such as Unger calls for in his avant-



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gardist moments, *e.g.*, Unger, *supra* note 1, at 592, might well end civilization. *See* note 109 *supra*. These facts may explain why modernist theory is more important to the practice of art than CLS theory is to the practice of law; legal institutions have greater incentives to insulate themselves from radical theory. The message of the present essay could then be restated as follows: if the radical theory is neo-Kantian, so much the worse for legal institutions; if the radical theory is avant-gardist, so much the worse for the theory. (I would like to thank Michael Kelly for pressing on me the dissimilarity between CLS and artistic modernism.)